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No. 80-2100

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

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QUENTIN ROGERS, *et al.*,
*Appellants,*
v.
HERMAN LODGE, *et al.*

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**On Appeal from the United States Court of Appeals for the Fifth Circuit**

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## MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF APPELLEES

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## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

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The Lawyers' Committee for Civil Rights Under Law seeks leave to file the annexed brief as *amicus curiae*. The appellees have consented to the filing of this brief, but appellants have not.

The Lawyers' Committee was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. Protection of the voting rights of citizens has been an important aspect of the work of the Committee; it has pro-

vided legal representation to litigants in numerous voting rights cases for the past fifteen years.*

This case presents important issues of proof and legal standards applicable to challenges to at-large elections for dilution of black voting strength. The case has importance beyond its immediate facts because the ruling of the Court will affect pending and future litigation in this area. The Lawyers' Committee represents black voter plaintiffs and is otherwise involved in four pending cases challenging at-large election schemes,** and the Court's ruling in this case is likely to have a direct impact on the outcome of those pending cases.

In our view, the judgment of the Court of Appeals should be affirmed, but we wish to present arguments different from those expressed by the Court of Appeals or likely to be forwarded by the parties. We take the position that the District Court's conclusion that at-large county commission elections are being maintained for an invidious purpose is amply supported by subsidiary find-

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* For example, the Lawyers' Committee represented a class of black citizens of Mississippi in reapportionment litigation which was before this Court on several occasions: *Connor* v. *Johnson*, 402 U.S. 690 (1971); *Connor* v. *Williams*, 404 U.S. 549 (1972); *Connor* v. *Waller*, 421 U.S. 656 (1975); *Connor* v. *Coleman*, 425 U.S. 675 (1976); *Connor* v. *Finch*, 431 U.S. 407 (1977); *Connor* v. *Coleman*, 440 U.S. 612 (1979); *id.*, 441 U.S. 792 (1979); *United States* v. *Mississippi*, 444 U.S. 1050 (1980). The Lawyers' Committee also has been granted leave of this Court to file briefs *amicus curiae* in a number of important voting rights cases decided by this Court, including *McDaniel* v. *Sanchez*, 68 L. Ed.2d 724 (1981); *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980); *Wise* v. *Lipscomb*, 437 U.S. 535 (1978); and *East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636 (1976).

** *Kirksey* v. *City of Jackson*, 506 F. Supp. 491 (S.D. Miss. 1981), *aff'd*, —— F.2d —— (5th Cir., December 11, 1981); *Boykins* v. *City of Hattiesburg*, Civil No. H77-0065(C) (S.D. Miss., filed May 27, 1977); *Greenville Citizens for More Representative Government* v. *City of Greenville*, Civil No. GC-77-99-S (N.D. Miss., filed August 30, 1977); and *Jordan* v. *City of Greenwood*, Civil No. GC-77-52-K (N.D. Miss., filed May 6, 1977).

ings of fact and evidence which prior decisions of this Court have held are sufficient to support a conclusion of discriminatory purpose. We also argue that at-large elections in Burke County are unconstitutional because they perpetuate the present effect of a past purposeful and intentional denial to blacks of equal access to the political process, and that proof of the unresponsiveness of the white elected officials to black interests should not be a controlling element of proof of the unconstitutionality of the at-large election system under which the officials were elected.

Accordingly, the Lawyers' Committee seeks leave to file this brief to present questions of law and legal argument that are not likely to be presented by the parties and which, if accepted, would directly control this Court's disposition of this case.

WHEREFORE, the Lawyers' Committee for Civil Rights Under Law respectfully moves the Court for leave to file the attached brief *amicus curiae.*

Respectfully submitted,

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## INDEX


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| INTEREST OF AMICUS CURIAE | 1 |
| SUMMARY OF ARGUMENT | 1 |
| ARGUMENT | 2 |
| I. THE DISTRICT COURT'S CONCLUSION THAT AT-LARGE ELECTIONS HAVE BEEN MAINTAINED IN BURKE COUNTY FOR THE DISCRIMINATORY PURPOSE OF DENYING BLACKS EQUAL ACCESS TO THE POLITICAL PROCESS IS CORRECT AND SHOULD BE SUSTAINED | 2 |
| II. THE CONSTITUTION PROHIBITS AT-LARGE ELECTIONS WHICH HAVE THE EFFECT OF PERPETUATING OFFICIAL AND INTENTIONAL DENIAL TO BLACKS OF EQUAL ACCESS TO THE POLITICAL PROCESS | 15 |
| III. THE OPINION OF THE COURT OF APPEALS IS INCORRECT INSOFAR AS IT *REQUIRES* A SHOWING OF UNRESPONSIVENESS TO SUSTAIN A CHALLENGE TO AT-LARGE ELECTIONS | 28 |
| CONCLUSION | 30 |

## TABLE OF AUTHORITIES

*Cases* Page

*Allen* v. *State Board of Elections*, 393 U.S. 544 (1969) ..... 4, 5, 10
*Avery* v. *Midland County*, 390 U.S. 474 (1968) ..... 5
*Brown* v. *Board of Education*, 347 U.S. 483 (1954) ..... 29
*Chapman* v. *King*, 154 F.2d 460 (5th Cir.), *cert. denied*, 327 U.S. 800 (1946) ..... 21
*City of Mobile* v. *Bolden* 446 U.S. 55 (1980) ..... 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 14, 15, 16, 26, 28, 29
*City of Rome, Georgia* v. *United States*, 446 U.S. 156 (1980) ..... 15
*Columbus Board of Education* v. *Penick*, 443 U.S. 449 (1979) ..... 7, 8, 19
*Connor* v. *Finch*, 431 U.S. 407 (1977) ..... 4, 10
*Connor* v. *Johnson*, 402 U.S. 690 (1971) ..... 4
*Dayton Board of Education* v. *Brinkman*, 443 U.S. 526 (1979) ..... 7, 18, 19
*East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976) ..... 4
*Flax* v. *Potts*, 404 F.2d 865 (5th Cir.), *cert. denied*, 409 U.S. 1002 (1972) ..... 19
*Gaston County* v. *United States*, 395 U.S. 285 (1969) ..... 23
*Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968) ..... 17
*Keyes* v. *School District No. 1*, 413 U.S. 189 (1973) ..... 18
*Kirksey* v. *Board of Supervisors of Hinds County, Mississippi*, 554 F.2d 139 (5th Cir.) (*en banc*), *cert. denied*, 434 U.S. 968 (1977) ..... 15, 16, 23, 24
*Lodge* v. *Buxton*, 639 F.2d 1358 (5th Cir. 1981) ..... 3, 19, 24, 28
*Louisiana* v. *United States*, 380 U.S. 145 (1965) ..... 16, 17
*McGill* v. *Gadsden County Commission*, 535 F.2d 277 (5th Cir. 1976) ..... 21
*McMillan* v. *Escambia County, Florida*, 639 F.2d 1239 (5th Cir. 1981) ..... 21, 29

TABLE OF AUTHORITIES—Continued

Page

*Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 265 (1979) ..... 4, 20
*Reitman* v. *Mulkey*, 387 U.S. 369 (1967) ..... 15
*Smith* v. *Allwright*, 321 U.S. 649 (1944) ..... 25
*Stewart* v. *Waller*, 404 F. Supp. 206 (N.D. Miss. 1975) (three-judge court) ..... 14
*Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) ..... 18, 19
*Village of Arlington Heights* v. *Metropolitan Development Corporation*, 429 U.S. 252 (1977) .... 5, 7, 9, 14, 15, 20, 29
*Washington* v. *Davis*, 426 U.S. 229 (1976) .....1, 3, 5, 6, 15, 16, 20
*Whitcomb* v. *Chavis*, 403 U.S. 124 (1971) ..... 2
*White* v. *Regester*, 412 U.S. 755 (1973) .....1, 2, 3, 4, 5, 15, 16, 17, 19, 25
*Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) .....15, 16, 28

*Statutes*

42 U.S.C. § 1973 .....8, 9, 22, 23
Ga. Code § 2-403 ..... 23
Ga. Code § 34-1015 .....7, 14, 27
Ga. Code § 34-1513 .....7, 14, 27

*Other*

Campbell, A., et. al., THE AMERICAN VOTER (1960) ..... 24
Campbell, A., et. al., THE VOTER DECIDES (1954).. 24
Davidson, C. and Korbel, G., *At-Large Elections and Minority Group Representation: A Re-Examination of Historical and Contemporary Evidence*, 43 J. OF POL. 982 (Nov. 1981) ..... 6
Engstrom, R. and McDonald, M., *The Election of Blacks to City Councils: Clarifying the Impact of Electoral Arrangements on the Seats/Population Relationship*, 75 AM. POLITICAL SCI. REV. 344 (June 1981) ..... 6

TABLE OF AUTHORITIES—Continued

Page

Erbe, W., *Social Involvement and Political Activity: A Replication and Elaboration*, 29 AM. SOC. REV. 198 (1964) ..... 24

Hays, S., *The Politics of Reform in Municipal Government in the Progressive Era*, 55 PAC. NORTHWEST Q. 157 (1964) ..... 12

Jones, C., *The Impact of Local Election Systems on Black Political Representation*, 11 URB. AFF. Q. 345 (March 1976) ..... 6

KOUSSER, J., THE SHAPING OF SOUTHERN POLITICS (1974) ..... 21

Karnig, A., *Black Representation on City Councils*, 12 URB. AFF. Q. 223 (Dec. 1976) ..... 6

Milbraight, L., POLITICAL PARTICIPATION (1965) .. 24

Note, *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 75 (1980) ..... 3

Rice, B., PROGRESSIVE CITIES: THE COMMISSION GOVERNMENT MOVEMENT IN AMERICA, 1901-1920 (1977) ..... 12, 13

Robinson, T. and Dye, T., *Reformism and Black Representation on City Councils*, 59 SOC. SCI. Q. 133 (June 1978) ..... 6

Silver, J., MISSISSIPPI: THE CLOSED SOCIETY (1964) ..... 21

Taebel, D., *Minority Representation on City Councils*, 59 SOC. SCI. Q. 143 (June 1978) ..... 6

United States Bureau of the Census, *Governing Boards of County Government: 1973* (1974) .... 12

United States Commission on Civil Rights, THE VOTING RIGHTS ACT: TEN YEARS AFTER (1975) .. 10

Weinstein, J., THE CORPORATE IDEAL IN THE LIBERAL STATE, 1900-1918 (1968) ..... 12

Weinstein, J., *Organized Business and the City Commissioner and Management Movements*, 28 J.S. HIST. 166 (1962) ..... 12

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## BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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### INTEREST OF *AMICUS CURIAE*

The interest of the Lawyers' Committee for Civil Rights Under Law in this matter is set out in the Motion for Leave to File this brief which is appended hereto.

### SUMMARY OF ARGUMENT

1. The evidence in the record amply supports the finding of the District Court that at-large elections for the County Commission of Burke County, Georgia have been maintained with the intent of continuing the historical exclusion of black citizens in Burke County from the political processes. This is clear because the evidence and findings are comparable to the indications of discriminatory intent found in *White* v. *Regester*, 412 U.S. 755 (1973), which was reaffirmed by *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980). Moreover, the evidence and findings conform to a number of factors which this Court, in a line of cases since *Washington* v. *Davis*, 426 U.S. 229 (1976), has said provide strong indicia of discriminatory intent.

2. Even if the evidence does not show discriminatory intent in the direct adoption or maintenance of this at-large election plan, the plan is nevertheless unconstitutional because it perpetuates the present effect of a prior intentional and unconstitutional exclusion of black citizens from the political process. This standard comports with the Court's previous decisions in vote dilution and school desegregation cases, and also focuses on the issue of discriminatory intent as required by the Court's holdings in equal protection cases. As found by the District Court, prior intentional and unconstitutional discrimination has excluded the black citizens of Burke County, Georgia from the political process, and the at-large plan for electing county commissioners in Burke County perpetuates that exclusion.

3. The Court of Appeals incorrectly held that proof of unresponsiveness is necessary to the successful maintenance of a constitutional challenge based on grounds of racial vote dilution. This conclusion, unnecessary to the resolution of the instant case, is based on a misreading of the plurality opinion in *Mobile*, and is inconsistent with previous holdings of this Court.

## ARGUMENT

### I. THE DISTRICT COURT'S CONCLUSION THAT AT-LARGE ELECTIONS HAVE BEEN MAINTAINED IN BURKE COUNTY FOR THE DISCRIMINATORY PURPOSE OF DENYING BLACKS EQUAL ACCESS TO THE POLITICAL PROCESS IS CORRECT AND SHOULD BE SUSTAINED.

At-large voting is not unconstitutional *per se*, but is unconstitutional if it has been conceived, operated, or retained "invidiously to minimize or cancel out the voting potential of racial or ethnic minorities." *City of Mobile* v. *Bolden*, 446 U.S. 55, 66 (1980) (plurality opinion); *see also*, *White* v. *Regester*, 412 U.S. 755, 765 (1973); *Whitcomb* v. *Chavis*, 403 U.S. 124, 149 (1971). The *Mobile* plurality concluded that plaintiffs' burden is to prove "that the disputed plan was 'conceived or oper-

ated as [a] purposeful devic[e] to further racial . . . discrimination.'" 446 U.S. at 66. However, the opinion of the plurality has been criticized as failing to provide adequate guidance to the lower courts in determining discriminatory purpose in vote dilution cases, and in particular "because it refused to draw inferences that are reasonable in light of the Court's intent decisions since *Washington* v. *Davis*, [426 U.S. 229 (1976)]." Note, *The Supreme Court, 1979 Term*, 94 Harv. L. Rev. 75, 147 (1980). This case gives this Court an opportunity to clarify *Mobile* and provide additional guidance.

We respectfully submit that the trial court's finding of intentional discrimination in the maintenance of Burke County's at-large election scheme was properly affirmed below on two separate grounds: first, because the proof that blacks were excluded from the political process in Burke County met the requirements of *White* v. *Regester*; and second, because the evidence more than amply established intent under more recent decisions of this Court. Our discussion of the evidence in the instant case will focus on the indicia of intent identified in those more recent decisions.

As the Court of Appeals in this case correctly points out,

> In a voting dilution case in which the challenged system was created at a time when discrimination may or may not have been its purpose, it is unlikely that plaintiffs could ever uncover direct proof that such system was being maintained for the purpose of discrimination.

*Lodge* v. *Buxton*, 639 F.2d 1358, 1363 (5th Cir. 1981) (footnotes omitted). "Quite simply, there will be no 'smoking gun.'" *Id.* at 1363 n. 8. This Court has made it clear from *Washington* v. *Davis* that: "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts . . ." 426 U.S. at 242.

Indeed, this Court has never required proof of overt racial statements or a subjective state of mind of racial intent. "Proof of discriminatory intent must necessarily rely on objective factors," *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 265, 279 n. 24 (1979), and requires "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977). Furthermore, to prevail, plaintiffs need not prove that a racial purpose was the sole, dominant, or even the primary purpose for a challenged action, but only that it "has been a motivating factor in the decision." *Arlington Heights*, *supra*, 429 U.S. at 265-266. "Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not." *Personnel Adm'r of Massachusetts* v. *Feeney*, *supra*, 442 U.S. at 277 (1979).

While the evidence in the instant case certainly proves a constitutional violation in light of a *White* v. *Regester* analysis,[1] which was reaffirmed by the *Mobile* plurality

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[1] The *Mobile* plurality's suggestion that a constitutional distinction may exist between multi-member legislative districts and local at-large governments, 446 U.S. at 70, is untenable and, at the very least, inapplicable to this case. There is nothing in *White* v. *Regester* or this Court's other cases to indicate that the *White* v. *Regester* analysis hinged on the presence of legislative districts as opposed to other units of government. The potential harm involved—the submersion of electoral minorities—is present both in multi-member legislative districts and local at-large election plans, *see Connor* v. *Finch*, 431 U.S. 407, 415 (1977), and *Allen* v. *State Board of Elections*, 393 U.S. 544, 569 (1969), and this Court has therefore expressed its strong preference for single-member districts in court-ordered reapportionment plans in both the legislative and local government contexts. *See Connor* v. *Johnson*, 402 U.S. 690 (1971), and *East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636 (1976). Furthermore, there is no distinction expressed in this Court's malapportionment cases, which, like racial dilution cases, involve claims of diminished voting power. *Allen*, *supra*, 393 U.S. at 569. The malapportionment doctrine applies in like

(446 U.S. at 69-70),[2] it also supports a finding of discriminatory intent reached by considering factors identified in decisions of this Court since *Washington* v. *Davis*. It is those factors upon which this discussion will focus, rather than a *White* v. *Regester* factual analysis. As detailed below, the District Court's conclusion, affirmed by the Fifth Circuit, that "the present scheme of electing county commissioners . . . is being *maintained* for invidious purposes" (J.S., App. 71a) is amply supported by subsidiary findings of fact and evidence giving rise to inferences which this Court has held in prior cases are sufficient to support a conclusion of discriminatory purpose.

1. *Discriminatory impact.* In determining whether or not at-large voting is being retained for a discriminatory purpose, "[t]he impact of the official action—whether it

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fashion to local governments and state legislatures. *Avery* v. *Midland County*, 390 U.S. 474, 485 (1968).

The *Mobile* plurality's intimation of a constitutional distinction was accompanied by two observations apparently thought to give support to that distinction: (1) that the Mobile City Commission exercised not only legislative policymaking power, but also executive and administrative power, therefore requiring that each city voter cast an at-large ballot for each of the city commissioners, all of whom would exercise citywide administrative and executive functions; and (2) that at-large municipal elections were once "universally" heralded as good-government reforms. 446 U.S. at 70 and n. 15. The two observations are irrelevant to the present case—the first because the Burke County Commission exercises only legislative policymaking power, and not executive or administrative functions, and the second because it pertains to the history of municipal governments and not county governments. Additionally, as demonstrated later in this brief, the accuracy of the plurality's historical conclusion is highly questionable in light of recent historical research. And even if good-government reform played *some* part in the institution of the commission form of government in *some* American cities, that is no basis for making constitutional distinctions which affect the standards governing voting rights cases in *all* local governments, city and county.

[2] Justice Stevens appears also to have reaffirmed *White* v. *Regester*. 446 U.S. at 84, n. 2, as did Justice Blackmun and the *Mobile* dissenters.

'bears more heavily on one race than another,' *Washington* v. *Davis* [426 U.S.] at 242—may provide an important starting point." *Mobile, supra,* 446 U.S. at 70. As Justice Stevens aptly noted in *Washington* v. *Davis,*

> Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds.

426 U.S. at 253 (concurring opinion).

Here the District Court found that no black candidate has ever been elected to the County Commission, despite the fact that Burke County has historically been majority black in population (J.S., App. 66a). The District Court also found that when blacks ran for the County Commission, they carried majority black districts, but lost in countywide voting (*id.*, App. 72a-73a), and that when at-large elections were abolished in Waynesboro, the county seat, and single-member districts were implemented, there was an increase in black representation on the city council (*id.*, App. 73a).[3]

The District Court also found that the discriminatory impact of countrywide voting was enhanced by the large

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[3] Among social scientists, there is little question that at-large voting is racially discriminatory. Numerous empirical studies based on data collected from throughout the nation have found a direct causal relationship between at-large elections and exclusion of minority representation. *See, e.g.,* C. Davidson and G. Korbel, *At-Large Elections and Minority-Group Representation: A Re-Examination of Historical and Contemporary Evidence,* 43 J. OF POL. 982-1005 (Nov. 1981); R. Engstrom and M. McDonald, *The Election of Blacks to City Councils: Clarifying the Impact of Electoral Arrangements on the Seats/Population Relationship,* 75 AM. POL. SCI. REV. 344-354 (June 1981); D. Taebel, *Minority Representation on City Councils,* 59 SOC. SCI. Q. 143-52 (June 1978); T. Robinson and T. Dye, *Reformism and Black Representation on City Councils,* 59 SOC. SCI. Q. 133-41 (June 1978); A. Karnig, *Black Representation on City Councils,* 12 URB. AFF. Q. 233-43 (Dec. 1976); C. Jones, *The Impact of Local Election Systems on Black Political Representation,* 11 URB. AFF. Q. 345-56 (March 1976).

geographic size of the county which "has made it more difficult for blacks to get to polling places or to campaign for office" (*id.*, App. 91a), by the Georgia statutory majority vote requirement (Ga. Code Ann. § 34-1513) which "tends to submerge the will of the minority and to deny the minority's access to the system" (*id.*, App. 92a), by the numbered post requirement (Ga. Code Ann. § 34-1015) which "enhance[s] plaintiffs' lack of access to the system" (*id.*), and by the lack of any district residency requirement, so that "[a]ll candidates could reside in Waynesboro, or in 'lilly-white' neighborhoods" (*id.*, App. 93a).

The record in this case shows not only that the county-wide voting scheme has a racially disproportionate impact, but also that local white officials responsible for maintaining at-large voting concede and are fully aware that no black can get elected to the County Commission under this at-large system. (Tr., p. 168). This Court has recognized that "actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose." *Columbus Bd. of Educ.* v. *Penick*, 433 U.S. 449, 464 (1979); *see also*, *Dayton Bd. of Educ.* v. *Brinkman* (*Dayton II*), 443 U.S. 526, 536 n. 9 (1979) ("proof of foreseeable consequences is one type of quite relevant evidence of racially discriminatory purpose"). Since the responsible officials were aware and could reasonably foresee that the maintenance of this at-large election system would continue the historic exclusion of black representation from county government, it was appropriate for the District Court to infer that this discriminatory impact was intended.

2. *Pattern and practice of racial discrimination.* In proving discriminatory purpose, this Court has held: "The historical background of the decision is one evidentiary source, particulary if it reveals a series of official actions taken for invidious purposes." *Arlington Heights*, *supra*, 429 U.S. at 267. The findings of the District Court indicate that black citizens in Burke County

have been discriminated against and segregated in every aspect of public life, including political and electoral affairs, and that this racial discrimination and segregation is continuing down to the present time. Prior to the passage of the Voting Rights Act of 1965, blacks in Burke County were denied the right to register and vote by literacy tests, poll taxes, and white primaries, all maintained by county officials under color of state law (J.S., App. 71a-72a, 86a). Since the enactment of the Voting Rights Act, the County Commission has continued to deny the county's black citizens polling places and the opportunity to register and vote (J.S., App. 81a).

In addition, the District Court found that the County Commission continues to discriminate against black citizens in appointments to boards and commissions which oversee the execution of county government (J.S. App. 76a, 78a), in judicial appointments (*id.*, App. 78a-79a), by maintaining a discriminatory hiring policy for county employment (*id.*, App. 75a-76a, 79a), in paving of county roads (*id.*, App. 79a-80a), and by participating in the establishment of the Edmund Burke Academy, a segregated, all-white private school established to circumvent public school desegregation (*id.*, App. 81a-82a). The county's practice of racial discrimination in grand jury selection continued until 1977, when it was terminated under compulsion of court order (*id.*, App. 75a).

In short, whenever officials in Burke County came to a "crossroads where [they] could either turn toward [burdening minorities] or away from it," *Columbus Bd. of Educ.* v. *Penick*, *supra*, 443 U.S. at 463, n. 12, they consistently chose the alternative with the greatest discriminatory impact. Such evidence is highly probative of discriminatory intent. *Id.*

Indeed, this proof goes beyond the mere fact of unresponsiveness of the elected county officials to black needs and interests, which the *Mobile* plurality said "is relevant only as the most tenuous and circumstantial evidence of the constitutional invalidity of the electoral sys-

tem under which they attained their offices" (446 U.S. at 74), and the "original sin" (*id.*) of past discrimination. The findings of the District Court clearly demonstrate an official county policy of excluding black citizens from full participation in county government, a policy which is furthered and enhanced by the county's discriminatory at-large voting system, and of which at-large voting is an integral part. Moreover, in contrast to *Mobile*, the record here shows that blacks in Burke County do not always register and vote "without hindrance." *See Mobile, supra*, 446 U.S. at 73. Thus, this evidence of historic and present invidious discrimination against the black community gives rise to an inference, which was drawn by the District Court and affirmed by the Court of Appeals, that the county's at-large election scheme which excludes any opportunity for black representation is being maintained specifically for an invidious racial purpose.

3. *Lack of an adequate, nonracial reason.* The absence of a legitimate nonracial reason for a challenged action is probative of discriminatory intent, "particularly if the factors usually considered important by the decisionmakers strongly favor a decision contrary to the one reached." *Arlington Heights, supra*, 429 U.S. at 267 (footnote omitted). In at-large election challenges, this inquiry involves an analysis of the context in which at-large voting is maintained. *See, e.g., Mobile, supra*, 446 U.S. at 60-61 (plurality opinion).

Following the passage of the Voting Rights Act, giving blacks in Georgia the right to vote for the first time since Reconstruction, 18 Georgia counties switched from district elections to at-large elections. (T. 398-99). This pattern also was evident in other states covered by the Voting Rights Act,[4] providing evidence of discriminatory motivation behind at-large countywide voting.

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[4] For example, in Mississippi, 13 counties attempted to switch to at-large voting for members of boards of supervisors, the county governing board, and 22 counties attempted to switch to at-large

The District Court did not find any countervailing legitimate, nonracial reason for maintaining at-large countywide county commission elections in Burke County. It further found that the adoption of single-member districts would not impair the county's ability to function and could be reasonably accomplished (J.S., App. 91a, 96a). The system of government involved in this case, then, contrasts sharply with the system challenged in *Mobile*, in which "an entire system of local governance [was] brought into question" (446 U.S. at 70).

In *Mobile*, the fact that each of the Mobile, Alabama city commissioners was vested with both executive and administrative powers was alluded to by this Court as a potential non-racial justification for a system under which all voters cast ballots for all members of the city commission, inasmuch as it would be anomalous to elect a public official with a particular executive and administrative responsibility for the entire city (such as the commissioner in charge of public safety) from a limited geographic portion of the city. *See Mobile, supra*, 446 U.S. at 70. This is in contrast to a purely legislative policy-making body in which the responsibilities of each member are the same, and where each citizen is considered to have an adequate voice by voting for a single legislator who represents a specific geographic area. *See Connor* v. *Finch, supra*, 431 U.S. at 415. Unlike the Mobile City Commission, the Burke County, Georgia Board of Commissioners is purely a policymaking body, where each member's responsibilities are alike, and none possess executive or administrative functions.[5] Thus, there is no non-racial justification based on executive

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elections for county school board elections. *See Fairley* v. *Patterson, decided sub. nom. Allen* v. *State Bd. of Elections*, 393 U.S. 544, 550, 569, 574-576 (1969); U.S. COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 271 (1975).

[5] Executive duties are vested in the County Administrator, who is appointed.

and administrative responsibilities which underlies at-large elections in Burke County.[6]

Because of this distinction, "purpose" and "effect" are much more closely related in the instant case than in *Mobile*. There, the plurality said:

> The impact of the official action—whether it bears more heavily on one race than another—may provide an important starting point . . . But where the character of a law is readily explainable on grounds apart from race, as would nearly always be true where, as here, *an entire system of local governance is brought into question*, disproportionate impact alone cannot be decisive, and courts must look to other evidence to support a finding of discriminatory purpose.

446 U.S. at 70 (emphasis added). Since, in this case, "an entire system of local governance" is not at issue, disproportionate impact will be more probative of discriminatory intent, for a non-racial justification is not apparent. Indeed, the showing of racial impact is extremely relevant to a finding of purpose in the present lawsuit because the governmental decision at issue involves not a choice of an entire local governance system, but only a choice regarding electoral districting. Any such districting decision is merely a determination of which groups of voters will have the deciding votes in electing particular public officials. In essence, the goal of an apportionment scheme is the allocation of political power. Apportionment decisions are directly reflected in the resulting distribution of electoral power: which groups of voters possess power and which ones do not. The purpose, therefore, is commensurate

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[6] Justice Stevens expressed the view in *Mobile* that there can always be "a substantial neutral justification for a municipality's choice of a commission form of government . . . ." 446 U.S. at 92, n. 14 (concurring opinion). Insofar as that justification consists of the desire to have all city voters participate in the choice of officals who will exercise citywide executive and administrative power, it is unavailing to the defendants in this case.

with the result, and the result is a strong indication of the purpose.

Finally, and contrary to appellants' submission, (Br. 32, 41), the *Mobile* plurality's observations concerning the popularity and historical development of at-large municipal elections are irrelevant here, since they relate only to the development of municipal governments in America and not to at-large elections for county government.[7] Moreover, the thesis that at-large municipal elections were "universally heralded not many years ago as a praiseworthy and progressive reform of corrupt municipal government" (*Mobile, supra*, 446 U.S. at 70 n. 15) is flatly contradicted by the most recent and exhaustive research on the subject, contained in Rice, PROGRESSIVE CITIES: THE COMMISSION GOVERNMENT MOVEMENT IN AMERICA, 1901-1920 (University of Texas Press, 1977).

Dr. Rice's detailed historical analysis shows that the adoption of at-large voting under commission forms of municipal government in the early 1900s was generally the result of power struggles for the control of municipal government in which the white "business elites" (his term) used at-large elections to wrest political control from working class, ethnic, and minority citizens. *Id.* at xvi, 4-18, 26-29, 34-51, 60-61, and *passim*.[8] Far from

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[7] Unlike municipalities, a majority of which maintain at-large, citywide election systems (*Mobile, supra*, 446 U.S. at 61),

> [A] majority of all counties in the Nation are governed by popularly elected officials who represent districts or areas within their respective counties.

U.S. Bureau of the Census, *Governing Boards of County Government: 1973* (Series SS No. 68) 4 (1974).

[8] Dr. Rice's research and conclusions are amply supported by prior research in the field. *See, e.g.*, J. Weinstein, THE CORPORATE IDEAL IN THE LIBERAL STATE, 1900-1918, ch. 4 (1968); S. Hays, *The Politics of Reform in Municipal Government in the Progressive Era*, 55 PAC. N.W. Q. 157-69 (1964); J. Weinstein, *Organized Business and the City Commissioner and Management Movements*, 28 J. S. HIST. 166-82 (1962).

being "universally heralded" as a progressive reform measure, the spread of at-large municipal elections was bitterly opposed by organized labor (with some exceptions), working class elements, and ethnic and racial minorities who feared, quite correctly, that at-large voting would exclude them from participation in municipal government. *Id.* at 27-29, 47, 78, 84-89. Indeed, Rice concludes that a causal relationship can be inferred between black population in cities and the adoption of the commission form of municipal government (*id.* at 89), and notes: "Ethnic minorities were rightly suspicious of at-large elections that ended their close association with ward politics" (*id.* at 88).

A number of social reformers of the day fought the move to at-large voting for the reason that it diminished the impact of ethnic and minority votes (*id.* at 85), and Charles Beard, the noted contemporary political scientist, cautioned against at-large voting in his 1912 textbook on municipal government, stating that it "substantially excludes minority representation" (*id.* at 78).

Dr. Rice's research also cautions against any assumption that the initiation or continuation of at-large governmental schemes in municipal America was motivated only by good-government considerations. In many cities, at-large governments failed to increase efficiency or to eliminate factional bickering and boss politics. *Id.* at 88-99, 111. Although there was evidence of improvement in some municipalities, contemporary writers also criticized commission government municipalities for poor debt management, internal strife, extravagance, and lack of expert management. *Id.* at 96-97.

> In some cities the populace had simply traded the logrolling and political tradeoffs of ward politics for similar tactics among semi-autonomous departments.

*Id.* at 91.

Thus, even if this case involved a city rather than a county government, we would urge the Court to reject

the notion that the *Mobile* panel's generalized observation—which should in any event be reevaluated in light of relevant historical scholarship—can furnish a legitimate, non-racial reason for the perpetuation of at-large voting for Burke County Commissioners. Even less supportable is the suggestion that the plurality's generalization outweighs or rebuts the other substantial evidence of discriminatory intent in the record, or that it can substitute for a particularized inquiry—as was performed by the District Court here—into the motivation for retaining an at-large election scheme in a specific locality. *Cf. Stewart* v. *Waller*, 404 F. Supp. 206 (N.D. Miss. 1975) (three-judge court).

4. *Sequence of Events.* According to the court's decision in *Arlington Heights*: "The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes." 429 U.S. at 267.

In 1964, as the Civil Rights Movement reached its zenith and voter registration drives were underway in Georgia, the state legislature instituted majority vote and numbered post requirements—both of which disadvantage black voters—for all at-large county commission elections in Georgia, including those in Burke County. (J.S. App., 65a, n. 2). This matter of timing [9] is one of the pieces of evidence which shows that at-large elections were maintained for racially discriminatory reasons, for both measures have a discriminatory effect on black political participation.[10]

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[9] *See Arlington Heights, supra*, 429 U.S. at 267, n. 16 and accompanying text.

[10] Of course, plaintiffs here challenge the entire at-large scheme in Burke County, not just these particular characteristics. But evidence about the characteristics is highly relevant to the ultimate issue, for if they were adopted for a racially discriminatory reason, then the electoral system of which they are a part was obviously maintained for purposes of racial discrimination.

Moreover, the addition of these provisions indicates a substantive departure from normal state policy, in the *Arlington Heights* sense, since they were obviously considered unnecessary to the functioning of at-large elections prior to 1964. Indeed, there is no adequate non-racial explanation for the majority vote and numbered post requirements and the absence of a residency requirement—all of which disadvantage black voters—for there is nothing in the nature of at-large election schemes which requires these characteristics. *See generally, City of Rome, Georgia* v. *United States*, 446 U.S. 156, 183-185 and nn. 19-21 (1980); *White* v. *Regester, supra*, 412 U.S. at 766.

Because the District Court's conclusion of discriminatory purpose—affirmed by the Court of Appeals—relies on findings and evidence which sufficiently portray unconstitutional intent as defined by previous decisions of this Court, the judgment below should be affirmed.

## II. THE CONSTITUTION PROHIBITS AT-LARGE ELECTIONS WHICH HAVE THE EFFECT OF PERPETUATING OFFICIAL AND INTENTIONAL DENIAL TO BLACKS OF EQUAL ACCESS TO THE POLITICAL PROCESS.

An at-large voting system, though itself racially neutral, violates the Fourteenth and Fifteenth Amendments if it perpetuates an intentional and purposeful racially discriminatory denial of access to the political process. This perpetuation standard, which was approved in *Kirksey* v. *Board of Supervisors of Hinds County, Mississippi*, 554 F.2d 139, 143-144, 146 (5th Cir. 1977) (*en banc*), *cert. denied*, 434 U.S. 968 (1977), properly examines the "historical context and conditions" of a challenged governmental action. *Reitman* v. *Mulkey*, 387 U.S. 369, 373 (1967). Additionally, it focuses on the issue of discriminatory *intent*, and thereby meets the Fourteenth Amendment requisites of *Washington* v. *Davis*, and the plurality opinion in *Mobile*.[11] The *Kirksey* Court explained:

[11] *Kirksey* is consistent with the opinions and the decision in *Mobile*. Rather than relying on the type of *Zimmer* v. *McKeithen*

> If a neutral plan were permitted to have this discriminatory effect, minorities presently denied access to political life for unconstitutional reasons could be walled off from relief against continuation of that denial. The redistricting body would only need to adopt a racially benign plan that permitted the record of the past to continue unabated. Such a rule would *sub silentio* overrule *White* v. *Regester*. It would emasculate the efforts of racial minorities to break out of patterns of political discrimination.

554 F.2d at 147. This Court itself has acknowledged that, in the area of voting rights, the proper response to prior unconstitutional acts includes eliminating "the discriminatory effects of the past." *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965).

This constitutional analysis comports with the Court's unanimous decision in *White* v. *Regester*, which was reaffirmed in *Mobile*.[12] The ultimate proof required by *White* v. *Regester* was exclusion from the political system—a showing that "the political processes leading to nomination and election were not equally open to participation by the group in question." 412 U.S. at 766. This could be done, according to the Court, by proof of current exclusionary effect *along with* a demonstration of prior official discrimination—political and otherwise. Thus, of evidentiary importance were such things as a

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(485 F.2d 1297 (5th Cir. 1973)) laundry-list presumption disapproved by the *Mobile* plurality, the *Kirksey* Court focused on intent and found prior intentional discrimination, the exclusionary effects of which were perpetuated by the electoral scheme at issue.

To the extent that *Kirksey* relied upon or reflected the *Zimmer* analysis, it can be disregarded, allowing the perpetuation standard forwarded here to be viewed independently of *Zimmer*.

[12] It is clear that all of the opinions in *Mobile* approved the result in *White* v. *Regester*. The *Mobile* plurality concluded that *White* v. *Regester* rested upon an intent standard consistent with *Washington* v. *Davis*, and Justice Stevens' separate opinion did not disagree with *White* v. *Regester*, nor did Justice Blackmun or the dissenters.

history of official discrimination which touched on the political processes, historical exemption of blacks from the political party process, prior use of the poll tax and restrictive voter registration procedures, and historical discrimination which resulted in present low levels of minority voter registration. The perpetuation of the purposeful political exclusion caused by these prior instances of official discrimination compelled the Court to declare the multi-member districts at issue in violation of the constitution. It should be noted that the Court did *not* undertake an examination of the Texas government's motivation in 1970 in designing the districts. Nor was it considered necessary to demonstrate a causal link between the particularized effects of the multi-member districts and prior discrimination. It sufficed to show that prior purposeful official discrimination caused political exclusion of racial minorities, that the exclusion remained, and that it was perpetuated by the multi-member districts.[13]

A similar perpetuation standard has been consistently employed in school desegregation cases. In *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430 (1968), the Court articulated the duty of a school board to disestablish an unconstitutional dual school system. *Green* said that "freedom of choice" plans are not unconstitutional *per se*, but must be invalidated if they continue the segregative effect of the prior statutorily mandated dual school system.

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[13] This Court described with approval the District Court's action with regard to Bexar County, Texas: "Single-member districts were thought required to remedy 'the effects of past and present discrimination against Mexican-Americans,' [343 F. Supp. 704, 733], and to bring the community into the full stream of political life of the county and state by encouraging their further registration, voting, and other political activities." *White* v. *Regester*, *supra*, 412 U.S. at 769. Obviously, the Court felt that the Constitution requires eradication of the *effects* of past and present discrimination. *See Louisiana* v. *United States*, *supra*, 380 U.S. at 154.

Three years later, *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), emphasized that a school district has the constitutional duty to eliminate every vestige of state-imposed segregation. The Court noted that the Constitution is not satisfied by racially "neutral" government actions which allow the effects of prior unconstitutional discrimination to remain.

> "Racially neutral" assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a "loaded game board," affirmative action in the form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments. *In short, an assignment plan is not acceptable simply because it appears to be neutral.*

402 U.S. at 28 (emphasis added). *See also Keyes* v. *School District No. 1*, 413 U.S. 188 (1973). Similarly, when prior intentional discrimination in the area of voting rights presents black citizens with a "loaded game board," it is constitutionally insufficient to justify as racially "neutral" an electoral scheme which leaves the game board loaded by perpetuating past discrimination.

Only recently, in *Dayton Bd. of Educ.* v. *Brinkman (Dayton II)*, *supra*, the Court reiterated that a school board guilty of past intentional discrimination must avoid actions which have "the effect of increasing or perpetuating segregation." The measure of conduct under that duty "is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the system." Thus, the school board must "do more than abandon its prior discriminatory purpose." It must see that "pupil assignment policies and school construction and abandonment practices 'are not used and do not

serve to *perpetuate* or re-establish the dual school system.' " 443 U.S. at 538, *quoting Columbus Bd. of Educ.* v. *Penick, supra*, 443 U.S. at 460.

*Dayton II* and the other school cases illustrate that plaintiffs need not prove a direct causal link between prior discrimination and the discriminatory effects of the particular decision being challenged. For instance, if a challenge were brought to a neutrally motivated decision about the location of a new school in a formerly dual—and not yet unitary—system, plaintiffs would not be required to show that the particular and isolated discriminatory effect of the location (such as the projected one-race character of the school's enrollment) was the direct result of prior intentional discrimination; rather, it need only be demonstrated that the location perpetuates the segregation which has resulted from past maintenance of the dual system. 443 U.S. at 538. *See also, e.g., Flax* v. *Potts*, 404 F.2d 865 (5th Cir.), *cert. denied*, 409 U.S. 1002 (1972). Similarly, plaintiffs herein need not show that the effects of the at-large scheme itself directly resulted from prior discrimination;[14] they need only show that it actually perpetuates the direct effects of the past intentional discrimination.[15]

This Court has already made clear that the perpetuation principle is not limited to school desegregation cases. As Chief Justice Burger noted for a unanimous court in *Swann*, school cases do not differ from other types of litigation when it comes to the repair of a denial of constitutional rights. 402 U.S. at 15-16. Furthermore, the use of the perpetuation standard in the school deci-

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[14] Certainly there is evidence to make that proof, even though it is not required. For past discrimination directly caused current low voter registration levels for blacks and current bloc voting, both of which severely disadvantage blacks under the at-large electoral system.

[15] As previously noted, this point was also made by the Court's analysis in *White* v. *Regester*.

sions accords with this Court's emphasis on intent in other types of equal protection cases. *Washington* v. *Davis* specifically noted that the school desegregation cases have "adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must *ultimately be traced* to a racially discriminatory purpose." 426 U.S. at 240 (emphasis added).[16]

Moreover, the perpetuation standard was not rejected in *Washington* v. *Davis*, *Arlington Heights*, and *Personnel Administrator* v. *Feeney*, all of which examined only the present intent behind challenged enactments, and not the perpetuation of prior discrimination.[17] Finally, by allowing evidence of past history and current impact in the search for "ultimate" intent, *Washington* v. *Davis* and *Arlington Heights* obviously permit application of the perpetuation standard which links prior intentional discrimination with the maintenance of discriminatory effects. *Washington* v. *Davis*, *supra*, 426 U.S. at 242; *Arlington Heights*, *supra*, 429 U.S. at 267.

The record below and findings of the District Court amply support the conclusions that (1) prior purposeful discrimination resulted in the denial of equal access to the political process; (2) the effects of the intentional denial remain; and (3) the denial of equal access is perpetuated by the at-large system.

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[16] *See also Personnel Administrator* v. *Feeney*, *supra*, 442 U.S. at 272 ("if a neutral law has a disproportionately adverse impact upon a racial minority, it is unconstitutional under the Equal Protection Clause . . . if that *impact can be traced* to a discriminatory purpose." (emphasis added)).

[17] *Feeney* held that the Massachusetts legislature was not unconstitutionally motivated simply because it adopted a veteran's preference which had the foreseeable effect of perpetuating the *federal* government's intentional discrimination against women through its military policy. But *Feeney* did not involve a situation where, as here, the challenged decision is that of the particular governmental units whose own prior discrimination is being perpetuated.

### 1. *Prior purposeful discrimination*

It was not long after the Civil War ended that the State of Georgia began its successful efforts to disfranchise the newly freed black citizens. A poll tax was instituted in 1871, followed by a cumulative poll tax in 1877 which was specifically designed to eliminate blacks from the voter registration rolls. The white primary began its life in Georgia in 1898, with the final blow administered in 1908 by the passage of a comprehensive state constitutional suffrage amendment, which included manipulable tests for literacy and understanding, a property ownership requirement, and a grandfather clause. The overwhelming historical evidence shows that all of these measures were adopted with the express purpose of preventing blacks from voting.[18]

The white primary was not struck down until 1946 (J.S. at 74a; *Chapman* v. *King*, 154 F.2d 460 (5th Cir.), *cert. denied*, 327 U.S. 800 (1946)), and even after that blacks remained totally disfranchised in Georgia because of a combination of state and county government actions, including the poll tax and arbitrary administration of the literacy test. (J.S. App., 86a). It was 1965, with

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[18] J. Morgan Kousser, THE SHAPING OF SOUTHERN POLITICS, (Yale University Press, 1974), pp. 209-223, 239. It is interesting to note that the historical background of the 1908 Georgia Amendment clearly refutes the reasoning of those courts which automatically conclude that voting measures passed during a time of widespread black disfranchisement could not have been tainted by discriminatory intent. *See e.g.*, *McMillan* v. *Escambia County, Florida*, 638 F.2d. 1239, 1244 (5th Cir. 1981); *McGill* v. *Gadsden County Commission*, 535 F.2d 277, 280-281 (5th Cir. 1976). Despite the fact that only a few blacks were able to vote immediately prior to 1908 because of the existent poll tax and white primary, the suffrage amendment was nevertheless passed with the express purpose of providing extra insurance against blacks ever voting again. *Kousser, supra*, at 221. Governments caught in the grip of a period of racist fever often react with extreme and duplicative measures which far exceed that which is necessary to accomplish their invidious ends. *See* James Silver, MISSISSIPPI: THE CLOSED SOCIETY (Harcourt, Brace & World, 1964).

the passage of the Voting Rights Act, before blacks were even able to begin registering in significant numbers. However, in Burke County, Georgia, governmental authorities did not give up their fight against black suffrage, and intentional obstacles continued to be thrown in the path of black political participation well into the 1970s.[19] The County attempted to eliminate all but one polling place (Pl. Ex. 11; T. 42) and maintained only one registration site for years (J.S. App., 81a), thus making it difficult for the disproportionately impoverished black citizens to travel for the purpose of exercising their electoral rights. Voter registration was limited to one day, with an additional short period on Saturday morning which itself was later eliminated. (Pl. Ex. 7, 10, 41; T. 39, 41, 56).

Furthermore, the District Court's findings of fact show that the registration of potential black voters was being hindered by the County Commissioners' "sluggishness' even after commencement of this lawsuit. (J.S. App., 81a). According to the evidence, blacks for ten years sought registration sites in each of the 15 voting districts, but were falsely told by county officials that registration was illegal unless conducted at the courthouse; intervention from the Georgia Secretary of State was sought before this charade ended. (T. 734). Three additional sites were finally approved, but were open only for a few days prior to the 1976 election. (Pl. Ex. 99; T. 639; *see* J.S. App., 81a). Even then, there were instances of intentional efforts by county officials to prevent blacks from registering. (T. 319-321, 952).[20] The county steadfastly refused to appoint black deputy regis-

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[19] The Court of Appeals noted that the Burke County Commissioners made it necessary for blacks to go to court in an effort to obtain the right to register and vote. 639 F.2d at 1376-1377.

[20] These instances, along with other evidence of political exclusion, show that this case is unlike *Mobile*, where the District Court found that blacks register and vote "without hinderance." 446 U.S. at 73.

trars, despite the willingness of several black citizens to serve voluntarily. (T. 724, 953-956).

Literacy and understanding tests, long the tools of black disfranchisement, were readopted by the 1976 Georgia Constitution, Ga. Code § 2-403, and are inoperative only because of the Voting Rights Act.

In addition to discrimination touching directly on the political processes, there is extensive evidence and findings regarding the plethora of past official discrimination which pervaded Georgia[21] and Burke County in all walks of life, and which was found by the District to have caused blacks to suffer inadequate educational opportunities and overall socioeconomic disparities, which, in turn, affect their ability to participate in the political process. (J.S. App. 74a, 81a-84a).[22] *Cf. Gaston County* v. *United States*, 395 U.S. 285, 297 (1969) (in a county which previously provided blacks with inferior educations in segregated schools, "'[i]mpartial' administration of the literacy test today would serve only to perpetuate these inequities in a different form.").

### 2. *The effects of the intentional denial remain*

As all of this evidence of historical and recent intentional discrimination shows, blacks were totally excluded from the political process until 1965, and continue to be excluded to a greater degree than whites because of the discrimination. The District Court specifically found,

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[21] The District Court took judicial notice of Georgia laws indicative of discriminatory intent. (J.S. App., 76a).

[22] Based in part on expert testimony, the district court found that black citizens, suffering from disproportionately greater poverty than whites, have a generally heightened struggle for the means of daily sustenance, thereby reducing the time, energy, and opportunity for participation in the political process. This was held to be a result of past intentional discrimination. (J.S. App., 83-84 and n. 19). *See Kirksey, supra*, 554 F.2d at 145, n. 13.

and the Court of Appeals agreed,[23] that the intentional exclusion of blacks directly resulted in relatively low voter registration rates,[24] (J.S. App., 71-72; 639 F.2d at 1377-1378), thus inhibiting the efforts of blacks to elect candidates who share their political interests. This low level of registration takes on added significance in light of the fact that blacks constitute a majority of the county population. By prior intentional discrimination, government officials have kept black voter registration disproportionately low, thus preventing blacks from exercising significant political power.

Another consequence of the intentional racial segregation and discrimination practiced for years in Georgia and Burke County is bloc voting. As the District Court's finding indicates, official discrimination created distinct racial interests which manifest themselves at the polling places. (J.S. App., 72-73). Blacks, having suffered so long from the invidious discrimination thrust upon them,

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[23] All of the relevant district court findings of fact were affirmed by the Court of Appeals.

[24] As previously noted, the district court also found that official discrimination causing inadequate educational opportunities and socio-economic disparities which burden black citizens was manifest in low voter registration levels. The Fifth Circuit recognized the myriad ways in which racial discrimination can influence such political factors as voter registration levels: "Failure to register may be, for example, a residual effect of past non-access, or of disproportionate education, employment, income level or living conditions. Or it may be in whole or in part attributable to bloc voting by the white majority, *i.e.*, a black may think it futile to register." *Kirksey, supra*, 554 F.2d at 145, n. 13.

The principle that low socioeconomic status and deprivations in education, income, employment and other areas have a negative impact on opportunities for political participation is firmly established by numerous studies in political science. *See, e.g.*, L. Milbraight, POLITICAL PARTICIPATION, ch. V (1965); W. Erbe, *Social Involvement and Political Activity: A Replication and Elaboration*, 29 AM. SOCIOLOGICAL REV. 198 (1964); A Campbell, et al., THE AMERICAN VOTER, ch. 17 (1960); A. Campbell, G. Gurin, & W. Miller, THE VOTER DECIDES 187-99 (1954).

maintain their own political agenda geared in part to escaping racial oppression, and the majority of Burke County's white voters obviously do not support that agenda.[25]

Additionally, the Democratic Party in Burke County, which maintained segregation through the white primary and other devices of intentional discrimination, is a near reflection of its former self: the Burke County Democratic Executive Committee was for years all white and only recently added one black member. The District Court found that past official electoral discrimination within and without the party process accounted for the current dearth of black political participation in party affairs, which are closely linked to success in the electoral system as a whole. (J.S. App., 74a-75a, 87a-88a).[26]

Past intentional discrimination, according to the detailed findings of the District Court, also led to the paucity of appointments of black citizens to the various governmental boards whose membership is controlled by the Burke County Commissioners. (J.S. App., 76a, 78a-79a). This itself is a measure of exclusion of blacks from the process of government. Moreover, there can be no denial that service in appointed government positions can provide the familiarity with government and public expo-

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[25] This distinguishes the black citizens in Burke County from other political and special interest groups. Republicans cannot ascribe their political differences with Democrats to the burdens of past state-supported racial discrimination. Bloc voting in the black-white context, by contrast, is the vestige of such discrimination, and therefore, takes on constitutional significance. Certainly, without past segregation and discrimination, the political interests of whites and blacks would be much more closely intertwined.

[26] The activities of political parties are sufficiently intertwined with the political process to be considered highly relevant in a case such as this. *See White* v. *Regester*, 412 U.S. at 766-767. *See also Smith* v. *Allwright*, 321 U.S. 642 (1944).

sure that is helpful to electoral bids for public office. Blacks are rarely able to avail themselves of such opportunities because of the exclusionary actions of the Burke County Commissioners.

All of this intentional discrimination, and its well-documented effects, combine to create a situation where blacks were and still are seriously excluded from the political process.

### 3. *Denial of equal access is perpetuated by the at-large system*

Even when some black citizens escaped the most blatant forms of discrimination, and were able to register and vote, they found themselves confronted by an at-large system of electing county commissioners which, when combined with bloc voting—a continued vestige of racial discrimination—left their vote devoid of meaning in the Burke County Commissioners race.[27] It is no small frustration to work for years against the most flagrant forms of racial injustice to finally gain the freedom to physically place a ballot in the ballot box, only to see the power of that ballot consistently emasculated by a more

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[27] Justice Stevens writes in *Mobile* that voters from a racial minority may have a "critical impact" on municipal or county-wide at-large elections, and that their votes are therefore not rendered meaningless. 446 U.S. at 85, n. 5. This observation is valid only if black voters choose to provide the "swing vote" between competing white candidates. But, as indicated by the evidence of racial bloc voting in the instant case and in others, blacks who have long suffered from discrimination at the hands of white officials and who have long been excluded from the political process cannot realistically be expected to cast their votes for an unwanted candidate whose chance for electoral victory hinges upon the fact that he is white. Moreover, the evidence has shown that even a white candidate who identifies with black interests in Burke County, thereby giving blacks a reason to cast their swing vote for him, will surely suffer defeat at the hands of the bloc-voting white majority. (J.S. App., 73a).

subtle at-large election scheme, which the government can simply defend as racially "neutral."

Rather than seek to ameliorate the effects of political exclusion, the state and county governments have consistently chosen a path which disfavors black citizens. In addition to the refusal to appoint black deputy registrars, the delay in expansion of registration sites, the failure to appoint black members of government committees, etc., there has been the maintenance of at-large elections, the exclusionary effects of which were heightened in the 1960s—after black registration increased—by the addition of majority-vote and numbered-post requirements. (J.S. App., 65, n.2).[28]

In sum, the government has knowingly perpetuated the tragic effects of prior intentional racial discrimination against black citizens in Burke County and the intentional exclusion of those citizens from the political process by maintaining at-large elections in such a way that blacks cannot elect candidates of their choice, whereas in a districting system, such electoral success would be possible.[29]

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[28] The *Mobile* plurality discounted the significance of numbered post and majority vote requirements by saying "they tend naturally to disadvantage any voting minority." 466 U.S. at 74. That point is irrelevant to the instant analysis, for however those features impact other voting groups, it is clear that in this case they disadvantage a racial minority whose political exclusion is directly caused by intentional discrimination. The fact that they also disadvantage other groups—say Republicans—whose relative political exclusion is caused by factors unlinked to lawless discrimination is of no constitutional consequence.

[29] It is not proportional representation which the black citizens of Burke County seek. Were the black population spread evenly throughout the county, electoral success would be prevented even in a districting system because of geographic factors unrelated to the method of election. The plaintiffs would then have no case. But the Burke County black population is not so dispersed, and the plaintiffs seek only that which would occur in the absence of the at-large system.

## III. THE OPINION OF THE COURT OF APPEALS IS INCORRECT INSOFAR AS IT *REQUIRES* A SHOWING OF UNRESPONSIVENESS TO SUSTAIN A CHALLENGE TO AT-LARGE ELECTIONS.

In an unprecedented departure from decisions of this Court, the Court of Appeals stated that proof of unresponsiveness is a *prerequisite* to a successful dilution claim, despite the fact that the issue is unnecessary to resolution of the instant case. *Lodge* v. *Buxton*, 639 F.2d at 1373-1374.[30]

Underlying the appeals court's conclusion was an effort to understand the *Mobile* plurality's treatment of *Zimmer* v. *McKeithen*. According to the Fifth Circuit panel, the refusal by the *Mobile* plurality to accept *Zimmer* in its entirety reflected disapproval of the failure of the *Zimmer* plaintiffs to prove unresponsiveness. But the *Mobile* plurality implied no such thing. It disapproved of *Zimmer* to the extent that proof of the "*Zimmer* criteria" had been construed to necessarily create a presumption of discriminatory intent. 446 U.S. at 73. Nothing was said about responsiveness in terms of the *Zimmer* decision.

Indeed, the *Mobile* plurality's statements about unresponsiveness flatly contradict the Court of Appeals' conclusion. According to the plurality, unresponsiveness "is relevant only as the most tenuous and circumstantial evidence" of the constitutional validity of at-large sys-

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[30] Since unresponsiveness was clearly proven by the plaintiffs, according to the District Court and the Court of Appeals, the effect of the absence of such proof need not be decided in this case. Unfortunately, however, the Court of Appeals' decision on this issue needs to be addressed by this Court in the context of this case, lest the Court of Appeals and the District Courts within the Fifth Circuit labor in future cases under the misapprehension that it constitutes a correct application of the law.

tems. 446 U.S. at 74. Certainly, the plurality cannot be thought to imply that "tenuous" evidence is a necessary prerequisite to a successful lawsuit.

Thus, in an opinion which preceded the Court of Appeals' decision below, another panel of the Fifth Circuit concluded that "[a]fter *Bolden* . . . [w]hether current office holders are responsive to black needs . . . is simply irrelevant . . .; a slave with a benevolent master is nonetheless a slave." *McMillan* v. *Escambia County, Florida, supra*, 638 F.2d at 1249 (5th Cir. 1981).

In other areas "responsiveness" has been rejected as an element which defeats a claim of discrimination. For example, in *Arlington Heights*, this Court said that "a consistent pattern of official racial discrimination" is not a necessary predicate to a constitutional violation. "A single invidiously discriminatory government act . . . would not necessarily be immunized by the absence of such discrimination in the making of other comparable decisions." 429 U.S. at 266, n. 14.

What the Court of Appeals' ruling condones is the maintenance of an otherwise discriminatory exclusion of black voters from the political process simply because they have been provided with roughly equal governmental services. Certainly, school boards which maintain equal funding and services for black students cannot use that excuse to justify placement of those students in a separate school on the basis of race. *Brown* v. *Board of Education*, 347 U.S. 483 (1954). Neither, then, can the Court of Appeals' holding stand as an excuse for governments to place black citizens on the outside of the political system simply by spending additional money on them.

## CONCLUSION

The judgment of the Court of Appeals should be affirmed, except that its holding that proof of unresponsiveness is a controlling factor in vote dilution cases should be disapproved. Alternatively, if this Court determines that the District Court's findings are insufficient to support its conclusion of unconstitutionality, the judgment should be vacated and the case remanded to the District Court for reconsideration in light of *Mobile*.

Respectfully submitted,

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